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No. 89--

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

THE PEOPLE OF THE STATE OF CALIFORNIA

Petitioner,

v.

HODARI D.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA FIRST APPELLATE DISTRICT

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QUESTIONS PRESENTED

1. Whether physical restraint is required for the seizure of a person under the Fourth Amendment.
2. Whether a citizen who is pursued by a police officer on a public street may immunize himself from prosecution by discarding incriminating evidence and asserting that he did so out of fear of an unlawful search.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	2
JURISDICTION	3
CONSTITUTIONAL PROVISION INVOLVED	4
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
ARGUMENT	14
I. A PERSON FLEEING FROM THE PRESENCE OF A POLICE OFFICER IS NOT RESTRAINED WITHIN THE MEANING OF THE FOURTH AMENDMENT	14
II. RESPONDENT VOLUNTARILY ABANDONED THE EVIDENCE ON THE STREET	23
CONCLUSION	32

TABLE OF AUTHORITIES

CASES	Page
Adams v. *Williams* 407 U.S. 143 (1972)	21, 28
Alderman v. *United States* 394 U.S. 165 (1969)	25
Brower v. *County of Inyo* ___ U.S. ___ 103 L.Ed.2d 628 (1989)	11-13, 19, 21, 22, 25, 29, 30, 31
California v. *Ciraolo* 476 U.S. 207 (1986)	19
California v. *Greenwood* 486 U.S. 35 (1988)	18
Dow Chemical Co. v. *United States* 476 U.S. 227 (1986)	18
Florida v. *Riley* ___ U.S. ___, 102 L.Ed.2d 835 (1989)	18
Florida v. *Royer* 460 U.S. 491 (1983)	21
Hester v. *United States* 265 U.S. 57 (1924)	26
In re Christopher Leon B. 1990 Cal.App. LEXIS 268	29
In re Hodari D. 265 Cal.Rptr. 79 (1989)	2, 15, 24

TABLE OF AUTHORITIES (cont'd.)

CASES	Page
INS v. *Delgado* 466 U.S. 210 (1984)	17
Katz v. *United States* 389 U.S. 347 (1967)	18
McGautha v. *California* 402 U.S. 183 (1971)	31
Michigan v. *Chesternut* 486 U.S. 567 (1988)	17, 20
People v. *Holloway* 176 Cal.App.3d 150 221 Cal.Rptr. 394 (1985)	29
People v. *Martinez* 239 Cal.Rptr. 433 (1987)	30
People v. *Menifee* 100 Cal.App.3d 235 160 Cal.Rptr. 682 (1979)	29
People v. *Patrick* 135 Cal.App.3d 290 185 Cal.Rptr. 325 (1982)	29
People v. *Raybourn* 218 Cal.App.3d 308 266 Cal.Rptr. 884 (1990)	29
People v. *Salgado* 218 Cal.App.3d 300 266 Cal.Rptr. 887 (1990)	29

TABLE OF AUTHORITIES (cont'd.)

CASES	Page
People v. *Washington* 192 Cal.App.3d 1120 238 Cal.Rptr. 840 (1987)	30
Rakas v. *Illinois* 439 U.S. 128 (1978)	18, 20
Reid v. *Georgia* 448 U.S. 438 (1980)	21
State v. *Lemmon* 568 A.2d 48 (Md. 1990)	30
Terry v. *Ohio* 392 U.S. 1 (1968)	16, 20, 28
Wong Sun v. *United States* 371 U.S. 471 (1963)	23, 24, 29
United States v. *Crews* 445 U.S. 463 (1980)	25, 30
United States v. *Mendenhall* 446 U.S. 544 (1980)	16, 18-20
United States v. *Sokolow* ___ U.S. ___, 104 L.Ed.2d 1 (1989)	21

TABLE OF AUTHORITIES

STATUTES AND OTHER AUTHORITIES	Page
United States Constitution Fourth Amendment	4
28 U.S.C. § 1257(a)	3
California Health & Safety Code § 11350	5
California Welfare & Institutions Code § 602 § 700.1	5 5
Supreme Court Rules, rules 13.1, 13.4	3
California Rules of Court rules 24(a), 25(a), 28(f)	3
3 La Fave, Search and Seizure § 9.2(h), pp. 39-40 (2d Ed. 1987, Supp. 1990)	30

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The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First Appellate District, which was entered on December 15, 1989.

OPINIONS BELOW

The opinion of the California Court of Appeal was reported at 216 Cal.App.3d 745, 265 Cal.Rptr. 79 (1989), but was withdrawn from publication by order of the California Supreme Court on March 15, 1990. A copy of the opinion is attached to this petition as Appendix A. The California Supreme Court denied review in this matter on March 15, 1990. A copy of the order of denial is attached to the petition as Appendix B.

JURISDICTION

The opinion of the California Court of Appeal was filed on December 15, 1989. The California Supreme Court denied review on March 15, 1990, at which time the opinion of the court of appeal became final and reviewable by this Court. California Rules of Court, rules 24(a), 25(a), 28(f). This petition for writ of certiorari followed within 90 days of the latter date. Supreme Court Rules, rule 13.1, 13.4. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

STATEMENT OF THE CASE

A. Procedural History.

By a petition filed in the Alameda County Superior Court, sitting as a Juvenile Court, on April 20, 1988, it was alleged that respondent Hodari D. came within the provisions of California Welfare and Institutions Code section 602, in that he possessed cocaine, in violation of California Health and Safety Code section 11350. (CT 1).[1]

On May 2, 1988, respondent moved to suppress evidence under Welfare and Institutions Code section 700.1. (CT 12-18.) The juvenile court denied the motion on May 19, 1988. (CT 38.)

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1. "CT" refers to the Clerk's Transcript on Appeal. "RT" refers to the Reporter's Transcript.

The jurisdictional hearing began on May 20, 1988. The court found the allegations of the petition to be true on the same day. (CT 39.)

On June 6, 1988, the court continued a previous wardship and ordered that respondent be placed in an appropriate county facility for a maximum period of five years and eight months. (CT 50-52.)

On December 15, 1989, the California Court of Appeal, First Appellate District, reversed the judgment of wardship, finding that the only evidence supporting the petition had been obtained as a result of an illegal search and seizure directed at respondent. 265 Cal.Rptr. 79 (1989). On March 15, 1990, the California Supreme Court denied petitioner's application for review.

B. Statement of the Facts.

On April 18, 1988, at 10:00 p.m., Officers Brian McColgin and Jerry Pertoso of the Oakland Police Department's Drug Task Force were on patrol in the vicinity of Foothill Boulevard and 64th Avenue, when they saw four young men standing on the right side of a red car parked at the curb. The youths saw the officers and ran away even before the officers had stopped. Two of the youths ran southward toward the rear of an apartment complex located at 2663-63rd Avenue; the other two ran westward to the rear of an abandoned, burned-out house at 2665-63rd Avenue. The car drove away, proceeding southbound on 63rd Avenue at "a high rate of speed." When the car and the youths left the area, the officers were about 40 yards away from them. The driver, Officer

McColgin, did not activate his emergency equipment. (RT 1-4; 11-13.)

Officer McColgin drove to the place where the red car had been parked. Officer Pertoso left the patrol unit, ran northward back to Foothill Boulevard, and then westbound along that street. Officer McColgin testified that the reason for their pursuit was that "we believed that there was some type of illegal [narcotics-related] activity occurring there" and "[w]e wanted to stop the individuals who had run and find out who they were and what their purpose was for being there in the area." (RT 4.)

As Officer Pertoso ran along Foothill Boulevard, he saw respondent Hodari D. "running northbound toward me but he was looking over his shoulder as if to be looking for someone to follow him." (RT 14.) As respondent arrived at a point about 11 feet from the

officer, he turned forward, saw the officer, and "had a startled look on his face." (RT 18.) Then, "in an underhand scooping motion with the right hand, [respondent] discarded a single loose rock to the sidewalk along the side of the house." (RT 15.) The officer had not said or done anything other than "to be where he was." (RT 15.) Officer Pertoso stopped respondent, forced him to the ground, and handcuffed him. (RT 15.) Less than a minute passed between Pertoso's initial observation of respondent and the latter's discarding of the rock of cocaine. (RT 16.)

REASONS FOR GRANTING THE WRIT

This case presents a factual scenario which occurs almost every day in this Nation's urban areas. A youth, sensing a police presence on the street, runs away. The police, curious about the reasons for the flight, follow him.

Fearing detention and search, the youth throws away his stash in the hope that the police will not detect it. But the officer picks up the contraband and arrests the youth. Thus completes the familiar chronology of recognition, flight, chase, abandonment, and apprehension.

The court of appeal made the following points. (1) Chasing a person on a public street implicates the provisions of the Fourth Amendment; physical restraint is not a necessary element of a seizure. (2) The act of running from police, who had done nothing to provoke flight, is insufficient cause for pursuit. (3) Incriminating evidence abandoned in the face of police pursuit is the fruit of the poisonous tree. The court of appeal thus declared that a police officer may not lawfully pursue -- or even run toward -- a citizen without specific cause to believe that he has committed a crime; if the officer does,

the citizen may immunize himself from prosecution by openly discarding anything in his possession, be it marijuana, cocaine, or a knife or gun. This view of the Fourth Amendment has given street criminals an unjustified and preemptive form of protection and has taken from police a necessary means to investigate suspicious behavior. Further, this construction is at odds with this Court's decision in *Brower* v. *County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628 (1989).

The opinion below contains two critical errors, both of national significance. First, the court held that a person running from a police officer has been seized within the meaning of the Fourth Amendment despite the officer's lack of control over the fleeing person. This conclusion turns the concept of seizure on its head. Seizure denotes physical control. If a person runs from a

police officer, it is a fiction, both physically and constitutionally, to assert that the person is seized. Seizure does not occur until the fleeing suspect has been physically restrained.

Second, the court of appeal held that the abandonment of incriminating evidence by a person fleeing from a police officer is the result of the chase. But this Court unmistakably declared in *Brower* that evidence discarded by a fleeing citizen is not a seizure within the meaning of the Fourth Amendment. The position which this Court adopted in *Brower* reflects a realistic assessment of the relationship between police and citizens on the streets of this Nation and works no injustice toward those who truly fear the possibility of becoming the target of an unlawful search. The court of appeal adduced no evidence to support its premise,

essential to the viability of its analysis, that police officers search every person whom they detain, even unlawfully. In the absence of evidence that a pursuing officer intends to search a prospective detainee, *Brower* is clearly correct in concluding that a reasonable person about to be detained does not justifiably fear the additional intrusion of a search.

Nor does *Brower* leave unprotected those who fear that they will be searched. If they are searched unlawfully, the fruits of the illegal police conduct will be suppressed. *Brower* merely advises persons who possess incriminating evidence that the Fourth Amendment will not protect them if they engage in self-help, a remedy not legitimized by the Exclusionary Rule.

It bears repeating that the facts of this case are typical of confrontations which occur almost daily in this

Nation. We respectfully suggest that it is time for this Court to provide definitive guidance to the police and citizens who find themselves participants in such an encounter.

ARGUMENT

I.

A PERSON FLEEING FROM THE PRESENCE OF A POLICE OFFICER IS NOT RESTRAINED WITHIN THE MEANING OF THE FOURTH AMENDMENT.

The California Court of Appeal made the following points in concluding that a fleeing citizen can protect himself from prosecution by discarding incriminating evidence: (1) a pursuit of a person in a public area by a police officer is a seizure of that person; there is "no requirement of physical restraint prior to a finding that a detention has occurred" *In re Hodari D.*, 265 CalRptr. 79,

84 (1989) (fn. omitted); (2) "[f]light alone . . . is insufficient to justify a detention" (*ibid.*); (3) when an officer attempts to detain a suspect by chasing him, "we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality" (*id.* at 85). With this syllogism the court created a brand new constitutional right: the right of a person who fears detention by a police officer to immunize himself from prosecution by discarding incriminating evidence on his person. The opinion of the court of appeal, however, is based upon two fundamental misconceptions, either of which requires reversal of its judgment. First, when a citizen exercises his constitutional right to leave the vicinity of a police officer, the former is not detained until the latter has forcibly restrained him. Second, even if one is unlawfully

detained, absent an official demand for disclosure or other manifestation of intent to search, the detainee's attempt to discard or hide any incriminating evidence attentuates the connection between the prior illegality and the subsequent recovery of the evidence.

In *Terry* v. *Ohio*, 392 U.S. 1, 19 n. 16 (1968), the Court stated, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." In *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980), two Justices of the Court clarified this requirement by stating that a person is seized, within the meaning of the Fourth Amendment, "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554 (fn. omitted)

(Opinion of Stewart, J.). The Court subsequently adopted this formulation. *See Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988); *INS* v. *Delgado*, 466 U.S. 210, 215 (1984).

This test is imprecise because it assesses the coercive effect of police conduct, taken as a whole, instead of focusing in isolation on discrete details of the police activity. *Michigan* v. *Chesternut*, 486 U.S. at 573. Further, although the test is characterized as "objective," "allow[ing] the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment" (*id.* at 574), the Court, and only the Court, can decide whether a reasonable person would have felt free to leave. This determination is based on a host of factors which a police officer must evaluate in a matter of seconds. "[W]hat constitutes a restraint on liberty . . . will vary, not only with the particular police conduct at issue,

but also with the setting in which the conduct occurs." *Id.* at 573. Thus, because an officer will not know whether a given set of facts will constitute a restraint until the Court so declares, we respectfully submit that it is inaccurate to conclude that the *Mendenhall* objective standard provides a reliable predictor for the officer in the street.[2]

2. A related area of Fourth Amendment jurisprudence illuminates the difficulties which an open-ended formulation poses for a police officer. In *Katz* v. *United States*, 389 U.S. 347 (1967), the Court redefined the elements of a search, discarding the standard of "constitutionally protected area" in favor of a "reasonable expectation of privacy." Compare *id.* at 353, *with* 361 (Harlan, J., concurring). Although the *Katz* formulation is more sensitive to privacy concerns in this age of high technology, it has not provided a standard to predict when this Court will decide that a search has occurred. *See Florida* v. *Riley*, ___ U.S. ___, 102 L.Ed.2d 835 (1989); *California* v. *Greenwood*, 486 U.S. 35 (1988); *Dow Chemical Co.* v. *United States*, 476 U.S. 227 (1986); *California* v. *Ciraolo*, 476 U.S. 207 (1986). Perhaps for that reason, the Court has emphasized that it has not altogether abandoned the familiar points of reference provided by property concepts in determining whether official conduct constitutes a search. *Rakas* v. *Illinois*, 439 U.S. 128, 143 n. 12 (1978).

Application of the *Mendenhall* test to the facts of this case demonstrates the limited utility of that standard in certain contexts. Specifically, the question whether a reasonable person would have believed that he was not free to leave necessarily assumes that he has *not* left. That is, the factual predicate for application of the *Mendenhall* test is stationary acquiescence to the officer's show of authority. Seizure denotes "an intentional acquisition of physical control." *Brower* v. *County of Inyo*, ___ U.S. ___, 103 L.Ed.2d 628, 635 (1989). Where, as here, the citizen has exercised his right to leave by running away, the *Mendenhall* test can have no relevance. The citizen is not under the officer's physical control. We

must look elsewhere for guidance to determine whether a seizure has occurred.[3]/

We return to *Terry*, which characterized a seizure as restraint by "physical force *or* a show of authority. . . ." 392 U.S. at 19 n. 16 (emphasis added). Because respondent did not acquiesce to any display of authority, we consider the alternative of physical force. Just as property concepts are relevant to a determination whether a search has occurred (*Rakas* v. *Illinois*, *supra*), so the indicia of physical restraint provide useful guidance to decide whether a seizure has taken place. We can think

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3. In *Chesternut*, of course, the defendant neither stopped nor fled. Applying the *Mendenhall* standard, the Court unanimously held that he had not been seized. The Court had no occasion to address the question whether flight is inconsistent with the proposition that a seizure has occurred. For the reasons stated in the text, *Mendenhall* cannot answer this question. Had the Court in *Chesternut* applied the formulation advanced in the concurring opinion (486 U.S. at 576-577), it would have reached the same result.

of no case decided by this Court which would have been resolved differently if this Court has applied this test. *E.g. United States* v. *Sokolow*, ___ U.S. ___, 104 L.Ed.2d 1 (1989); *Florida* v. *Royer*, 460 U.S. 491 (1983) (seized belongings; transported to police room); *Reid* v. *Georgia*, 448 U.S. 438 (1980) (returned to terminal with officers); *Adams* v. *Williams*, 407 U.S. 143 (1972) (officer standing next to door of car in which defendant was sitting). It is therefore entirely consistent with this Court's cases and faithful to the language and spirit of the Fourth Amendment to require physical control as an element of a seizure when the citizen has not acquiesced in an express or implicit show of authority. *See Brower* v. *County of Inyo*, *supra*.

Judged by this analysis, respondent had not been seized at the time he discarded the rock of cocaine. His

flight upon observing the police car manifested an assertion of his right to leave the area. That assertion did not terminate until he came within the physical control of the pursuing officer. The trial court found that he was not physically restrained at the moment he abandoned the cocaine. (RT 55; 265 Cal.Rptr. at 81 n.2) This finding is clearly supported by the evidence that the officer was 11 feet away from respondent, had not drawn a gun, had not flashed a badge, had not told respondent to stop, or otherwise had caused "a governmental termination of freedom of movement *through means intentionally applied*." *Brower* v. *County of Inyo*, 103 L.Ed.2d at 635. The officer's mobile presence[4/] on the street was not an

4. In the view of the court of appeal, the dispositive fact in finding a detention was that the officer was running toward respondent. 265 Cal.Rptr. at 82 n.2, 83, 84 n. 4. It may be inferred that the court would have reached the opposite result if the officer had walked toward appellant. Thus, according to the court of appeal, the Fourth

intentional application of restraining force. Therefore there was no seizure.

II.

RESPONDENT VOLUNTARILY ABANDONED THE EVIDENCE ON THE STREET.

Wholly aside from its conclusion that a person in flight has been seized, we find additional reason to disagree with the court of appeal. The court held that the abandonment of the rock of cocaine was the direct result of the attempted unlawful seizure -- the fruit of the poisonous tree. *Wong Sun* v. *United States*, 371 U.S. 471 (1963). The court stated that where police illegally attempt to stop a fleeing suspect, "we cannot see how the suspect's immediate discard of contraband can be anything

Amendment required the officer to decelerate when he saw respondent, even if he was physically unable to do so. Surely the scope of the right of privacy is not dependent upon the athletic talents of our law enforcement officers.

other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer's stated purpose in pursuing [respondent] was to stop him because of a hunch that illegal narcotic activity had taken place. . . . [Respondent's] act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence. [Citations omitted.] To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction." *In re Hodari D.*, 265 Cal.Rptr. at 85-86. Petitioner submits that despite the obligatory inclusion of the word "exploitation" in the above quotation, the state court actually applied the "but for" test expressly rejected in *Wong Sun*.

In *Wong Sun*, of course, this Court declared that "the more apt question is 'whether, granting establishment of the primary illegality, the evidence to which instant

objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" 371 U.S. at 488. Evidence which a defendant challenges must be the product of some illegal governmental activity (*United States* v. *Crews*, 445 U.S. 463, 471 [1980]), and he must demonstrate an exploitative nexus between the illegality and the challenged evidence. *Alderman* v. *United States*, 394 U.S. 165, 183 (1969). Petitioner submits that this Court's opinion in *Brower* v. *County of Inyo, supra*, forecloses the argument that the voluntary abandonment of contraband is the product of an exploitation of an attempted unlawful detention.

In *Brower*, the Court defined a seizure as "a government termination of freedom of movement *through means intentionally applied.*" 103 L.Ed.2d at 635

(emphasis in original). The Court then provided an example of what is not a seizure -- an example which is dispositive of this issue. The Court relied upon its earlier decision in *Hester* v. *United States*, 265 U.S. 57 (1924):

> "where an armed revenue agent had pursued the defendant and his accomplice after seeing them obtain containers thought to be filled with 'moon shine whiskey.' During their flight they dropped the containers, which the agent recovered. The defendant sought to suppress testimony concerning the containers' contents as the product of an unlawful seizure. Justice Holmes, speaking for a unanimous Court, concluded: 'The defendant's own acts, and those of his associates, disclosed the jug, the jar and the bottle - and there was no seizure in the sense of the law when the officers examined the contents of each after they had been abandoned.' (*Id.*, at 58 44 S.Ct. at 446.) Thus even though the incriminating containers were unquestionably taken into possession as a result (in the broad sense) of action by the police the Court held that no seizure had

> taken place. It would have been quite different, of course, if the revenue agent had shouted 'Stop and, give us those bottles in the name of the law!' and the defendant and his accomplice complied. Then the taking of possession would have been not merely the result of governmental action but the result of the very means (the show of authority) that the government selected, and a Fourth Amendment seizure would have occurred." 103 L.Ed.2d at 636.

We acknowledge that in this case the taking was the result of governmental action, for respondent indisputably abandoned the rock in reaction to the approaching officer. But we dispute that the abandonment was the result of "the very means . . . that the government selected. . . ."

To begin with, there is absolutely no evidence in the record that the officer intended to search respondent once he caught him. It is one thing to detain -- or threaten to detain -- a person on the street; it is quite another matter

to commit the additional intrusion of searching him for weapons. To do so, the police officer "must be able to point to specific and articulable facts" which indicate that the detainee was armed and dangerous. *Terry* v. *Ohio*, 392 U.S. at 21, 30; *Adams* v. *Williams*, 407 U.S. at 146. If a police officer intends to detain a person on the street, even illegally, it does not follow that he will commit the additional intrusion of conducting a pat search, let alone a search sufficiently intense to uncover a rock of cocaine.

Second, even if the officer did plan to seize evidence, he did not order respondent to drop the rock of cocaine. By hypothesis the officer would have found it by conducting a search after the detention. But the abandonment of the cocaine was not the means of discovery selected by the government.

The Court has recognized that "'an intervening independent act of a free will'" may attenuate the connection between an illegality and the discovery of evidence so as to dissipate any taint. *Wong Sun* v. *United States*, 371 U.S. at 486, 491. *Brower* stands for the proposition that, as a matter of Fourth Amendment jurisprudence, abandonment of incriminating evidence by a fleeing citizen is a voluntary act, a supervening event which breaks the causal chain between chase and recovery.[5]

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5. Cases in California are in hopeless disarray. As the court of appeal noted, two reported decisions are consistent with its reasoning. (*People* v. *Menifee*, 100 Cal.App.3d 235, 160 Cal.Rptr. 682 [1979]; *People* v. *Washington*, 192 Cal.App.3d 1120, 238 Cal.Rptr. 840 [1987]); two other cases reject the court's nexus analysis (*People* v. *Patrick*, 135 Cal.App.3d 290, 185 Cal.Rptr. 325 [1982]; *People* v. *Holloway*, 176 Cal.App.3d 150, 221 Cal.Rptr. 394 [1985]). Since the decision in this case, two other cases have followed it (*People* v. *Salgado*, 218 Cal.App.3d 300, 266 Cal.Rptr. 887 [1990]; *People* v. *Rayboum*, 218 Cal.App.3d 308, 266 Cal.Rptr. 884 [1990]), while one has rejected it (*In re Christopher Leon B.*, 1990

The state court of appeal suggested that suppression was necessary to deter police misconduct in the form of chasing citizens on the street without justification. 265 Cal.Rptr. at 86. Petitioner has two responses. First, the remedy is disproportionate to the perceived evil. An unlawful arrest does not require the abatement of prosecution. *United States* v. *Crews*, 445 U.S. at 474. *A fortiori*, an attempted illegal detention should not produce this result in the absence of evidence of an attempt to

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Cal.App. LEXIS 268.) The California Supreme Court has ordered "depublished" two cases which took contrary views on the issue: the instant case and *People* v. *Martinez*, 239 Cal.Rptr. 433 (1987).

Confusion about the applicable rule is reflected in the majority and dissenting opinions in *State* v. *Lemmon*, 568 A.2d 48 (Md. 1990) and in the incredulous analysis of one commentator who does not believe that *Brower* means what it apparently says. 3 La Fave, Search and Seizure § 9.2(h), pp. 39-40 (2d Ed. 1987, Supp. 1990). The suggestion of the concurring opinion in *Brower* that "its dicta seem designed to decide a number of cases not before the Court" (103 L.Ed.2d at 637 [Stevens, J., concurring]) seems to have gone unheeded so far.

search. Second, respondent or any other similarly situated citizen is not without redress if he is unlawfully detained and searched. His suppression motion would be granted and he would go free. But respondent chose to engage in self-help by trying to discard the cocaine without detection. The Constitution does not always protect a person from the legal consequences of an unwise choice. *Cf. McGautha* v. *California*, 402 U.S. 183, 213 (1971). *Brower* teaches that the consequence of respondent's decision was the discovery of admissible evidence.

CONCLUSION

For the foregoing reasons, we respectfully request that the Petition for Certiorari to the California Court of Appeal for the First Appellate District be granted.

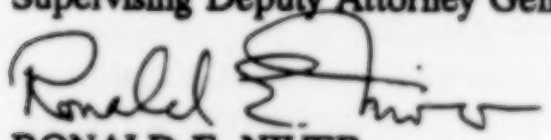
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APPENDICES

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re HODARI D., a Person Coming Under the Juvenile Court Law.	
PEOPLE OF THE STATE CALIFORNIA, Plaintiff and Respondent, v. HODARI D., Defendant and Appellant.	A043060 (Alameda County Super.Ct.No. 141401)

Hodari D., a minor, appeals from the juvenile court's order finding that he was in possession of cocaine and that he violated the curfew restrictions of his probation. We determine that the court erred in failing to suppress evidence obtained as a direct result of illegal police activity, and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On April 18, 1988, at approximately 10 p.m., Officer McColgin and Pertoso, assigned to a special duty drug task force, were on patrol in the area of Foothill Boulevard and 63rd Avenue in Oakland. They drove an

unmarked brown Dodge, and both officers wore blue jeans, tennis shoes, and blue jackets with the word "police" on the front and back. As the officers turned south onto 63rd Avenue, they saw four or five young Black males standing around a small red compact car parked at the curb approximately 40 yards away. Two members of the group looked at the Dodge and almost immediately started running west toward an apartment complex. The red vehicle drove off quickly and the other two individuals ran south on 63rd Avenue toward an abandoned house next to the apartments.

The officers were familiar with the apartment complex as an area of high narcotic activity in which they had made several arrests. There was no information as to whether any convictions had resulted from the arrests. By the time the officers pulled up to where the red vehicle had been parked, all of the individuals were out of sight. The officers did not see their faces, nor did they see any exchange of drugs, money, or any other furtive movements, but they believed there was "some type of illegal [narcotics-related] activity" taking place.

Officer Pertoso got out of his car and ran back up 63rd Avenue, turning west on Foothill to cut off the fleeing individuals to "find out who they were and what

their purpose was for being there in the area." Officer McColgin drove around the block in the opposite direction, also attempting to stop the individuals. As Pertoso ran westbound along Foothill, he saw appellant running towards him, looking back over his shoulder. Pertoso and appellant continued to run until they were approximately 11 feet apart, when appellant turned forward, saw the officer, and looked startled. Appellant then made a scooping motion with his hand, and discarded a single loose rock on the sidewalk. Pertoso suspected the rock was cocaine.

Pertoso apprehended appellant, forced him to the grass, handcuffed him, and radioed McColgin. McColgin arrived on the scene and retraced the route back to where the officers had originally seen the group. He found a baggie containing 15 chunks of what later proved to be cocaine near the apartment complex.[1/]

On April 20, 1988, a subsequent petition under Welfare and Institutions Code section 602 was filed against appellant alleging possession of cocaine. (Health & Saf. Code, § 11350.) A supplemental petition alleged a curfew violation. (Welf. & Inst. Code, § 777, subd. (a).)

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1. In a search incident to the arrest, police discovered $130 in appellant's shoe and a pager.

On May 2, 1988, appellant filed a motion to suppress all evidence seized as a result of his detention. (Welf. & Inst. Code § 700.1.) On May 19, the motion was denied. The court subsequently found the allegations of the petitions to be true.

At the dispositional hearing on June 6, appellant was ordered committed to Los Cerros Camp. A timely notice of appeal was filed on June 13, 1988.

DISCUSSION

On appeal, appellant challenges the court's suppression order, arguing that the cocaine should have been suppressed because the chase constituted a detention and the officers had no reasonable cause to detain appellant. Respondent argues that there was no detention until the officers caught appellant, and that absent an illegal police threat to search, as opposed to a threat to detain, appellant's discard of the cocaine is not a result of a threatened illegality.

The trial court's findings and reasoning were not entirely clear. The court stated: "I'm not concerned with the illegality of the chase on these facts. I think this was clearly illegal. The cops had no reasonable basis for

doing what they did in chasing him."[2/] The court's concern was with the issue of whether, granting the initial illegality, "[A]m I required to find that anything that was disposed of . . . that's suppressible?" The trial court found it illogical that discarded evidence should be suppressed, even though the court felt that the evidence would have been suppressed if appellant left it in his pocket and the police discovered it during a search following appellant's apprehension. It appears that the court's main concern was with the nexus between the illegality and the evidence, rather than the issue of whether there was illegal police conduct. We approach the issue as a three-part inquiry into whether a detention occurred, if there was reasonable cause for detention, and

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2. The trial court noted that there was no "actual detention" until after appellant discarded the rock. The court was distinguishing between threatened detentions and actual, physical detentions. The court also stated, however, that the police had no right to chase appellant or to detain him. Under the facts of this case, as compared to cases in which an officer merely follows a suspect, we find there was an actual detention, for Fourth Amendment purposes, when the officer confronted appellant head on at a run, as at that point, the officer communicate an intent to capture or block appellant's freedom of movement. (Michigan v. Chesternut (1988) 486 U.S. ___, ___ [108 S.Ct. 1975, 1980].)

whether abandonment of the evidence was a direct result of an illegal detention.

Was There a Detention?

We apply federal law, but utilize state law where it does not conflict with federal law in evaluating the issues involved. (In re Lance W. (1985) 37 Cal.3d 873.) In reviewing a motion to suppress, we accept the factual finding of the trial court which are supported by substantial evidence, but we independently determine whether the facts conform to the constitutional standards of reasonableness. (People v. Leyba (1981) 29 Cal.3d 591, 596-597.) Since only the police officers testified in this case, the facts are undisputed.

Both parties correctly cite Michigan v. Chesternut, supra, 486 U.S. ___ [108 S.Ct. 1975] as the most recent Supreme Court case analyzing when police conduct constitutes a detention. In Chesternut, officers in a patrol car observed a man get out of a car and approach the defendant. When defendant saw the officers, he turned and ran. The patrol car followed, "'to see where he was going.'" As the car drove alongside, defendant discarded several packets containing codeine. (Id., 108 S.Ct. at p. 1977.)

The court noted it would "leave to another day the determination of the circumstances in which police pursuit could amount to a seizure under the Fourth Amendment." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980, fn. 9.) The court also declined to adopt a rule that "a lack of objective and particularized suspicion would not poison police conduct, no matter how coercive, as long as the police did not succeed in actually apprehending the individual." (Id., at p. 1979.) Instead, the court reaffirmed the test of United States v. Mendenhall (1980) 446 U.S. 544, that "the police can be said to have seized an individual 'only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.' [Citations]." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1979.) The test is designed to "assess the coercive effect of police conduct, taken as a whole, ..." (Ibid.)

In evaluating the facts of Chesternut, the Supreme Court noted that the police conduct in that case "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980.) There was no use of siren or flashers, no command to halt, and no

operation of the police car to block the suspect's course, "or otherwise control the direction or speed of his movement." (Ibid.) The court also noted that mere surveillance or approach by an officer is not a seizure. (Id., at pp. 1980-1981.) The court left open the question of when police pursuit would constitute a seizure. (Id., at p. 1980, fn. 9.)

In the instant case, appellant alludes to the coercive nature of the police action of engaging in an aggressive foot chase to cut off his flight and of sending an officer in each direction. Of course, appellant had disappeared by the time Officer Pertoso got out of the car, and thus had no knowledge of this police pincer maneuver. In fact, appellant never saw Officer McColgin until after he was under arrest. Police conduct of which the suspect is unaware is not relevant to a Fourth Amendment analysis. (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1980, fn. 7.) The only police conduct with which we are concerned in the instant case is that of Officer Pertoso as he ran up Foothill Boulevard toward appellant, from the time appellant, who was also running, looked forward and saw the officer running directly at him.

We have no doubt that it is coercive and intimidating to discover a police officer running directly toward one, some 11 feet away on a public sidewalk. Indeed, the sight of a running officer, even without a command to halt, would reasonably convince most citizens that they were not free to ignore the officer and leave. We disagree with the trial court that there was no detention until the officer physically gained control of the suspect. This case involves more than a pursuit, as Officer Pertoso did not pursue appellant, but ran in such a fashion as to cut him off and confront him head on. Under the rationale of Chesternut, this action is reasonably perceived as an intrusion upon one's freedom of movement and as a maneuver intended to block or "otherwise control the direction or speed" of one's movement. (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1080.)

California cases and federal cases have held that giving chase "in a manner designed to overtake and detain or encourage the individual to give up his flight is a detention." (People v. Washington (1987) 192 Cal.App.3d 1120, 1126; People v. Menifee (1979) 100 Cal.App.3d 235, 239 [officer's rapid pursuit of suspects who knew the officers could be reasonably viewed as an intended

detention]; United States v. Bowles (5th Cir. 1980) 625 F.2d 526, 532 [officer in pursuit of suspect who passes him, turns to face him and holds out credentials has restrained the suspect].) A citizen has the right to leave at the approach of police, and when the officer takes action to prevent a citizen's exit, the officer has restrained the citizen's freedom of movement. (People v. Washington, supra, 192 Cal.App.3d 1120, 1125-1126.)

Respondent contends that by its citation of Hester v. United States (1924) 265 U.S. 57 in Brower v. County of Inyo (1989) 489 U.S. ___ [109 S.Ct. 1378], a civil rights case, the Supreme Court has adopted the suggestion of two justices in Chesternut that there can be no detention until a fleeing suspect is actually caught.[3]

3. The language referred to in Chesternut is: "It is at least plausible to say that whether or not the officers' conduct communicates to a person a reasonable belief that they intend to apprehend him, such conduct does not implicate Fourth Amendment protections until it achieves a restraining effect." (Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1981.) If this statement refers to a requirement of physical restraint, it would be contrary to many years of Supreme Court precedent stating that no physical restraint is necessary to constitute a detention. (Adams v. Williams (1972) 407 U.S. 143, 146 [involuntary rolling down of vehicle window in response to officer's request denoted a "forcible stop"]; Terry v. Ohio (1967) 392 U.S. 1, 19, fn. 16 ["[o]nly when the officer, by means

(Michigan v. Chesternut, supra, 108 S.Ct. 1975, 1081, Kennedy J., concurring, joined by Scalia, J.) We do not find that conclusion is compelled by Brower. In Hester, defendant and an accomplice were under surveillance as a result of an informant's tip. Officers saw the accomplice hand defendant a quart bottle, at which point the court stated: "An alarm was given." (Hester v. United States, supra, 265 U.S. 57, 58.) Defendant grabbed a gallon jug and fled with the accomplice. An officer pursued, and the two men dropped the bottles, which the officers recognized as containing illegal whiskey. It appears from these facts that the officers in Hester had at least a reasonable suspicion, having lawfully witnessed the transaction with the bottles, which would have justified a detention prior to defendant's flight. The case has no application to illegal detentions, nor does it purport to define what constitutes a detention, but merely states that there was no seizure when the officers inspected the bottles.

The Brower court's purpose in citing Hester was to illustrate its statement that the term "seizure" could not

of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."].)

be applied to an unknowing act, but must be the result of government means "intentionally applied." (Brower v. County of Inyo, supra, 109 S.Ct. 1378, 1381.) The court was considering a case in which a fleeing suspect had been killed when his car crashed into a police roadblock. The lower court had concluded that the death was caused by the suspect's voluntary act of failing to stop. The Supreme Court stated that this "decision to continue the chase" could not eliminate the county's responsibility for termination of his movement. (Id., at p. 1380.) The court concluded that use of the roadblock to stop the car was a seizure. We find no application to the instant case, and no requirement of physical restraint prior to a finding that a detention has occurred.[4/] We conclude, on the facts of this case, that there was a detention, and that the detention began as soon as appellant saw the officer running toward him.

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4. Even if physical seizure were required, we believe that the facts of the instant case illustrate a situation tantamount to a physical seizure. Appellant, who was running down the sidewalk, had his physical freedom of movement sufficiently blocked by the presence of a police officer, wearing a jacket marked "police," who was 11 feet away and running toward him.

Reasonable Cause to Detain

The trial court concluded that the police had no reasonable cause to detain appellant prior to his discard of the drugs. Respondent does not dispute the trial court's finding that the police had no reasonable cause to chase or detain appellant, choosing to rest on the argument that there was no detention. The trial court's decision on this issue is supported by the law.

Initially, we note that the fact of appellant's flight at the sight of the officers is sometimes relevant in assessing the existence of an officer's reasonable suspicion, where, as here, the flight is not triggered by an illegal act on the part of the officer. (3 LaFave, Search and Seizure (2d Ed. 1987) § 9.3(c), p. 449, fn. 150, citing Commonwealth v. Thibeau (1981) 429 N.E.2d 1009.) Flight alone, however, is insufficient to justify a detention. (People v. Aldridge (1984) 35 Cal.3d 473, 478.) "If the right to be free from unjustified detention is lost merely by seeking to avoid such encounters, then the right is meaningless; it would exist only to the extent it was not exercised." (People v. Bower (1979) 24 Cal.3d 638, 649 [fact that appellant, white, observed by police with a group of blacks, started moving hurriedly away raises no inference of criminal activity]; Wong Sun v. United States

(1963) 371 U.S. 471, 482-483 [suspect's flight from narcotics officer at door does not justify otherwise illegal police action].) Flight coupled with other "specific knowledge on the part of the officer relating the suspect to the evidence of crime" may be considered in assessing an officer's actions. (Sibron v. New York (1968) 392 U.S. 40, 66-67.) Thus, the fact that appellant ran away can support a detention only when coupled with other specific knowledge.

The only other factor known to the officers in the instant case at the time was that the address where the red car was parked was an area of high narcotic activity. The hour (10:30 p.m.) was not unusually late; the officers observed no exchange of drugs or money; there was no Vehicle Code violation observed; and the officers did not recognize any of the people standing near the car. The factors of nighttime, high drug activity in the area, and seeking to avoid police were held insufficient to justify a detention in People v. Aldridge, supra, 35 Cal.3d 473, 478. We must conclude that the facts known to the officers in the instant case at the time they began to chase appellant, and when appellant became aware of the effort to stop him, did not constitute "'. . . specific and articulable facts causing [the officers] to suspect that (1)

some activity relating to crime has taken place or is occurring or about to occur, and (2) the person [the officers] intend[] to stop or detain is involved in that activity. . . .'" (People v. Aldridge, supra, 35 Cal.3d 473, 478; In re Tony C. (1978) 21 Cal.3d 888, 893.)

Link Between Abandonment of the Cocaine and the Illegality

Finding that appellant was detained without a reasonable suspicion of criminal activity does not end our inquiry. Not all evidence obtained through illegal police action must be excluded. (Wong Sun v. United States, supra, 371 U.S. 471, 487-488.) The test is not whether the evidence would have come to light but for the illegality, but if the evidence was obtained as a direct result, or exploitation of the illegality. If the evidence was obtained by sufficiently independent means, or an intervening independent act of the defendant, the "taint" of illegality is said to have been purged. (Ibid; People v. Lee (1986) 186 Cal.App.3d 743, 751.)

Respondent argues that appellant failed to show a nexus between the police action and the evidence, as there was no showing that the police intended to search him as opposed to merely detaining him. Respondent

disputes our analysis in People v. Menifee, supra, 100 Cal.App.3d 235, and the holding in People v. Washington, supra, 192 Cal.App.3d 1120, and cites two opposing cases as the correct analysis of the nexus requirement. (People v. Patrick (1982) 135 Cal.App.3d 290; People v. Holloway (1985) 176 Cal.App.3d 150.) The latter two cases conclude that absent a police threat of an illegal search, evidence that is abandoned by a fleeing suspect is the product of a voluntary act rather than a product of an illegal detention. We cannot agree that the illegality involved must be a search in order for discovered evidence to be suppressed as a direct result or exploitation of the illegality.

"[T]he exclusionary sanction applies to any 'fruits' of a constitutional violation -- whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the curse of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention." (United States v. Crews (1980) 445 U.S. 463, 470, fns. omitted.) Factors to be considered in determining whether evidence is a product of police illegality include whether the evidence was obtained as a product of the defendant's free will, the temporal

proximity of the illegality to the discovery of the evidence, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. (Brown v. Illinois (1975) 422 U.S. 590, 603-604 [considering whether a confession was obtained by exploitation of an illegal arrest].) None of these factors require a showing of an illegal search as the triggering illegality, as opposed to an illegal arrest or detention.

Where the police illegality involved is running head on at a suspect in an effort to stop him, we cannot see how the suspect's immediate discard of contraband can be anything other than a direct result and exploitation of the illegality. There were no intervening circumstances; the officer's stated purpose in pursuing appellant was to stop him because of a hunch that illegal narcotic activity had taken place. The officer's acts were unfounded, as he admitted he originally saw nothing suspicious other than the four Black youths standing near a car. Appellant's act of abandoning the evidence when confronted with the running officer in his path was not a mere coincidence. (United States v. Pirolli (11th Cir. 1982) 673 F.2d 1200, 1204 [abandonment that is the product of police misconduct is not voluntary]; United States v. Beck (5th Cir. 1979) 602 F.2d 726, 730 [throwing marijuana out car

window not voluntary abandonment after officer had pulled police car in front of defendant's parked vehicle].) To say the police did not obtain the evidence through exploitation of their illegal activity would be a fiction.

The purpose of the exclusionary rule to deter illegal police conduct is served by our decision. "Incriminating admissions and attempts to dispose of incriminating evidence are common and predictable consequences of illegal arrests and searches, and thus to admit such evidence would encourage such Fourth Amendment violations in future cases." (4 LaFave, Search and Seizure, op. cit. supra, § 11.4(j), pp. 459-460.) If the police had no legal ground to obstruct appellant's path, exclusion of the evidence obtained as a direct result of that action serves to deter the repetition of such unfounded detentions.

We adhere to the analysis mandated by Wong Sun, Crews, and Brown, and determine that the challenged evidence was obtained as a direct result of the

illegal detention. The trial court erred in ruling that the evidence was admissible in the action below.

The order appealed from is reversed.

CERTIFIED FOR PUBLICATION

Racanelli, P.J.

We concur:

Nesom, J.

Stein, J.

Trial Court: Superior Court, County of Alameda

Trial Judge: Hon. Wilmont Sweeney

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AO43060
In re Hodari D.

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Court of Appeal - First App. Dist.
Ron D. Barrow, Court Clerk

APPENDIX B

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division One, No. A043060

S013842

IN THE SUPREME COURT OF STATE OF CALIFORNIA

IN BANK

In Re HODARI D., A Person Coming Under the Juvenile Court Law

THE PEOPLE, Respondent

v.

HODARI D., Appellant

Respondent's petition for review DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed December 15, 1989, which appears at 216 Cal.App.3d 745. (Cal. Const., Art.VI, Section 14; Rule 976, Cal. Rules of Court.)

LUCAS
Chief Justice

SUPREME COURT
Filed March 15, 1990
Robert Wandruff Clerk